UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK STURM, Petitioner and Appellant, vs. CALIFORNIA ADULT AUTHORITY, LAWRENCE E. WILSON, Warden of San Quentin State Prison, California, et al., Respondents and Appellees.	)	No. 22072

APPELLEES' BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

JOHN T. MURPHY
Deputy Attorney General

JOYCE F. NEDDE
Deputy Attorney General

6000 State Building
San Francisco, Califonria 94102
Telephone: 557-3259

Attorneys for Appellees

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degree), and was sentenced to imprisonment for the term prescribed by law (not less than five years) (CT 2, EXHIBIT A). Appellant did not appeal from the judgment of conviction (CT 2-3).

Applications for writs of habeas corpus to the Superior Court of Marin County (No. 46263) and the California Supreme Court (No. 10402) were denied on August 18 and October 26, 1966, respectively (CT 5-6).

B. Proceedings in the Federal Courts

A petition for writ of certiorari to the United States Supreme Court was denied on March 20, 1967 (CT 5-6). Appellant then filed a petition in forma pauperis for a writ of habeas corpus (No. 47178) in the District Court on March 30 (CT 1-149). On June 1, the petition was denied (CT 150-51); and on June 21, a motion for rehearing was denied (CT 169). On July 7, Judge Sweigert granted appellant's application for certificate of probable cause and for leave to appeal in forma pauperis (CT 182). On July 14, appellant filed a notice of appeal to this Court (CT 183).

STATEMENT OF THE FACTS

On March 6, 1957, in the Superior Court of the City and County of San Francisco, appellant was convicted of robbery in the first degree (Penal Code section 211) and sentenced to imprisonment in the State Prison for the term prescribed by law (EXHIBIT A). On August 17, 1959, the

Amendment rights to the due process of law were violated in that the California Adult Authority has no jurisdiction to the rescinding, redetermining or refixing of the term of sentence once that term of sentence has been fixed pursuant to statutory law, all of which they did so do in the instant case in June, 1960 and July, 1962?

(B) Whether appellant's Eighth Amendment rights concerning the cruel and unusual punishment clause were violated when the California Adult Authority augmented a fixed term of sentence, in July, 1962, subsequent to punishment by the state prison disciplinary committee, in April, 1960, pursuant to an infraction of state prison rule by appellant, if such may be the case?

(C) Whether appellant's Fourteenth Amendment rights to the equal protection of law clause, of like people, in like circumstances, like conditions, like or equal burdens, were violated by appellees et al., by the technical discharge, under seal, of appellant's co-defendant, in June 1962, while appellant remains this day unduly imprisoned for the same debt to society that both were sentenced to state prison for from the state trial court of record in March, 1957?

SUMMARY OF APPELLEES' ARGUMENT

I. The petition does not present a federal question and therefore the District Court had no jurisdiction to grant habeas corpus relief.

II. The Adult Authority has power to determine and redetermine the length of appellant's sentence.

III. The Adult Authority has power to redetermine and lengthen appellant's sentence as a result of infraction of prison rules.

IV. The alleged release of appellant's co-defendant from prison does not compel appellant's release.

ARGUMENT

I

THE PETITION DOES NOT PRESENT A FEDERAL QUESTION AND THEREFORE THE DISTRICT COURT HAD NO JURISDICITION TO GRANT HABEAS CORPUS RELIEF

In In re Costello, 262 F.2d 214 (9th Cir. 1958), it was held that the refixing and lengthening by the California Adult Authority of the term of a prisoner who had violated parole did not involve a federal question; but, rather, was one of purely local nature involving the interpretation of a state sentencing statute, and in the absence of a federal question, the federal courts had no authority to say California interpretation of its statutes, authorizing such action by the Adult Authority, was erroneous. See also In re Mclain, 55 Cal.2d 78 (1960), cert. denied, 368 U.S. 10.

The indeterminate sentence system whereby the Adult Authority fixed, refixed, and refixed again plaintiff's duration of imprisonment is without constitutional infirmity. Dreyer v. Illinois, 187 U.S. 71, 83-84 (1902); Ughbanks v.

Armstrong, 208 U.S. 481, 485 (1908).

We submit that no such federal question has been presented by petitioner as shown by the arguments which follow.

II

THE ADULT AUTHORITY HAS THE POWER TO DETERMINE AND REDETERMINE THE LENGTH OF APPELLANT'S SENTENCE

Appellant was convicted of robbery in the first degree (§ 211);[1] which is punishable by imprisonment in the state prison for not less than five years (§ 213). Section 671 states that where no maximum term is prescribed, the punishment shall be life imprisonment. Section 1168 provides that when a person is sentenced to be imprisoned in a state prison, the court on imposing the sentence shall not fix the term or duration of the period of imprisonment. The Adult Authority may determine what length of time a person shall be imprisoned (§§ 3020 and 5077). These sections of the Penal Code are not violative of equal protection of the law for they operate uniformly against all of the class to which they apply. In re Northcott, 71 Cal.App. 281 (1925). Accordingly, the enforcement of an order by the Adult Authority fixing the duration of confinement should not be a matter for intervention by the federal courts. See Siipola v. Ness, 90 F.Supp. 18 (D.C. Wash. 1950).

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1. All section references are to the Penal Code.

The length of such term of imprisonment is subject to redetermination from time to time within prescribed limits. People v. Leiva, 134 Cal.App.2d 100 (1955), and Fleischer v. Adult Authority, 202 Cal.App.2d 44 (1962). An indeterminate sentence is, in effect, a sentence for the maximum term, and the setting of the term at something less than the maximum by the Adult Authority is only tentative and may be changed, that is, increased. In re Costello, supra. A prisoner has no vested right to have his term fixed or remain fixed at less than the maximum prescribed by law. In re Smith, 33 Cal.2d 797 (1949): In re Schoengarth, 66 A.C. 288 (1967): and Azeria v. California Adult Authority, 193 Cal.App.2d 1 (1961). The action of the Adult Authority in lengthening the term of imprisonment beyond that originally and by law only tentatively. fixed but still within the maximum term provided for the offense of which his guilt has been adjudged, does not deprive a prisoner of liberty without due process of law. In re Smith, supra.

III

THE ADULT AUTHORITY HAS POWER TO RE-DETERMINE AND LENGTHEN APPELLANT'S SENTENCE FOR INFRACTION OF PRISON RULES

Appellant's sentence was originally fixed by the Adult Authority on August 17, 1959, at six years, with the last two years and nine months to be on parole. However on April 27, 1960, appellant was involved in an infraction

of the prison rules and, as a result, on May 31, the Adult Authority rescinded the action fixing his term and granting parole. Further disciplinary action against appellant was necessary on January 16, 1961, for another infraction the previous week. Thereafter, on July 3, 1962, appellant's sentence was refixed at ten and one-half years, with release to be upon an approved parole plan and appellant to attend the out-patient clinic. Appellant was subsequently paroled on October 19, 1962; but the parole was cancelled on September 13, 1963 (EXHIBIT B).

Appellant now contends that the action of the Parole Board on July 3, 1962, in refixing and lengthening his sentence to ten and one-half years was a violation of his constitutional rights. However, in Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961), cert. denied, 368 U.S. 862, the court said that apart from due process considerations, federal courts have no power to control or supervise state prison regulations and practices. See also Curtis v. Jacques, 130 F.Supp. 920 (W.D. Mich. 1954).

The action of the Adult Authority here did not constitute lack of due process against petitioner. In In re McLain, supra, it was held that an order of the California Adult Authority rescinding its prior action fixing a prisoner's sentence and revoking parole which had been set to commence at a future date, based on the grounds that the prisoner had been

found guilty of complicity in knifing a fellow inmate, disclosed good cause and constituted a valid redetermination of the prisoner's sentence. The order of revocation had the effect of revoking parole and restoring the maximum sentence. See also In re Schoengarth, supra.

IV

THE ALLEGED RELEASE FROM PRISON OF APPELLANT'S CO-DEFENDANT DOES NOT COMPEL APPELLANT'S RELEASE

Appellant alleges that his co-defendant has already been released from prison and that, as a result, his own continued imprisonment is unconstitutional and illegal. However, equal protection of the law does not require that all persons be dealt with identically, but rather that the laws be applied uniformly. Baxstrom v. Herold, 383 U.S. 107 (1966).

Section 3024.5 provides that the Adult Authority may refix a prisoner's term to discharge him whenever it has been determined that the prisoner has made a satisfactory adjustment and rehabilitation. Quite obviously, such a determination must be based upon the best interests of society and that particular prisoner and is in no way connected with the release or retention of a codefendant.

In Azeria v. California Adult Authority, supra, the court said that a major purpose of the indeterminate sentence law is to permit individual treatment of offenders according

to the best judgment of the Adult Authority; and the fact that other prisoners have had their sentences reduced or been granted parole affords no ground for complaint by a habeas corpus petitioner.

Therefore, petitioner has not shown he was denied equal protection of the law.

It is respectfully submitted that the order of the District Court denying the petition for writ of habeas corpus should be affirmed.

DATED: September 27, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

JOHN T. MURPHY
Deputy Attorney General

Joyce F. Nedde

JOYCE F. NEDDE
Deputy Attorney General

Attorneys for Appellees

JFN:cmw
CR SF
67-877

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

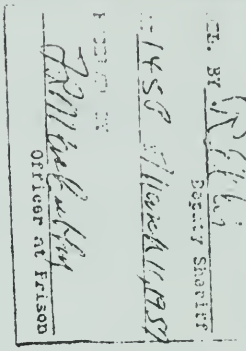
DATED: San Francisco, California

September 29, 1967

Joyce F. Nedde

JOYCE F. NEDDE
Deputy Attorney General
of the State of California

A P P E N D I X



DEPT. No. 6 CASE NO 53032

A-1799

In the Superior Court of the State of California

IN AND FOR THE CITY and COUNTY OF SAN FRANCISCO

ABSTRACT OF JUDGMENT

(Commitment to State Prison as provided by Penal Code Section 1213.5)

The People of the State of California,

vs

FRANK STUHM

Defendant.

Hon. Harry J. Neuburth (Judge of Superior Court)

F. G. Campbell (District Attorney)

H. P. Glassman (Counsel for Defendant)

This certifies that on the 6th day of March, 19 57 judgment of conviction of the above-named defendant was entered as follows:

In Case No. 53032 Count No. One he was convicted by Court (Court or Jury); on his plea of Not Guilty (guilty, not guilty, former conviction or acquittal, once in jeopardy, not guilty by reason of insanity); of the crime of Robbery, First Degree

(designation of crime and degree, if any, including fact that it constitutes a second or subsequent commission of same offense if that effects the sentence and if under Section 209 of the Penal Code whether victim suffered bodily harm)

in violation of Violating Section 211 of the Penal Code of the State of California

(reference to Code or Statute, including Section and Sub-section);

with prior convictions charged and proved or admitted as follows: None

DATE	COUNTY AND STATE	CRIME	DISPOSITION

Defendant Was (was) or (was not) charged and admitted being, or was found to have been armed with a deadly weapon at the time of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections 969c and 3024.

Defendant was not (was) or (was not) adjudged a habitual criminal within the meaning of Sub-division a or b (a) or (b) of Section 644 of the Penal Code; and the defendant is not (is) or (is not) a habitual criminal in accordance with Sub-division (c) of that Section.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in the State Prison of the State of California, for the term provided by law, and that he be remanded to the Sheriff of the City and County of San Francisco and by him delivered to the Director of Corrections of the State of California at the place hereinafter designated.

It is ordered that sentences shall be served in respect to one another as follows: (Note whether concurrent or consecutive as to each count):

and in respect to any prior incompleted sentence (s) as follows: (NOTE whether concurrent or consecutive as to all incomplete sentences from other jurisdictions):

To the Sheriff of the City and County of San Francisco and to the Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above-named defendant into the custody of the Director of Corrections at San Quentin, California at your earliest convenience.

Witness my hand and seal of said court

this 6th day of March, 1957

MARTIN MONGAN Clerk

by J. C. Fitzpatrick Deputy

SEAL

State of California, City and County of San Francisco)

I do hereby certify that the foregoing to be a true and correct abstract of the Judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

Attest my hand and seal of the said Superior Court this 6th day of March 19 57

MARTIN MONGAN

County Clerk and Ex-officio Clerk of the Superior Court of the State of California in and for the City and County of San Francisco

The Honorable: [signature]

Judge of the Superior Court of the State of California, in and for the City and County of San Francisco

Five days stay of execution.

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach a minute order reciting the fact and imposing sentence or ordering a suspended sentence into effect.

Recorded Min. Book, Dept. 6 Vol. .90 Page 273

CERTIFIED